Anderson Excavating and Wrecking Company *and* George Phares. Cases 33–CA–9113 and 33–CA–9137

June 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 17, 1991, Administrative Law Judge Wallace H. Nations issued the attached decision, finding that the Respondent violated Section 8(a)(3) of the Act by refusing to recall George Phares from layoff on May 30, 1990. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

On November 25, 1991, the Board issued an Order remanding the proceeding to the judge to make specific credibility findings as to an alleged May 30, 1990 conversation between Union Business Representative Charles Murphy and the Respondent's vice president, Lanny Levell. On January 17, 1992, the judge issued the attached supplemental decision in which he made the requested credibility findings and reaffirmed his original recommended Order. The Respondent filed a letter maintaining its original exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The Respondent excepts to the judge's finding that it violated Section 8(a)(3) by failing to recall Phares from layoff on May 30, 1990.[2] We find merit in the Respondent's exceptions, reverse the judge's finding, and dismiss the complaint.

The Respondent and the Union were parties to a collective-bargaining agreement covering demolition work at a jobsite in Springfield, Illinois. The Respondent was contractually obligated to obtain Operating Engineers employees from the Union's exclusive hiring hall. The Union referred applicants for work in order of registration on the referral register. The Respondent could not request by name a particular individual for referral.

On April 19, the Respondent requested referral of a crane operator. The Union referred George Phares. On May 19, the Respondent laid off Phares.

Union Business Representative Murphy testified that on May 30 he received a phone call from the Respondent's vice president, Levell, requesting an oiler. Murphy claimed that he reminded Levell that Phares was laid off from the Respondent's employ and that Levell should call Phares back for the oiler position. Murphy further testified that Levell responded he would not hire Phares as an oiler because he was an operator. The Union then referred Elmer Fickus for the oiler position.

The judge found that the Respondent unlawfully refused to recall Phares. The judge found that although someone requested an oiler on May 30, it was difficult to believe that Levell did so, because he was in Washington, D.C., that day. The judge did not resolve whether the Murphy-Levell conversation occurred or whether Murphy mentioned Phares during such a conversation.

The Board was unable to pass on the Respondent's exceptions to the judge's decision because the judge failed to make crucial findings about the Respondent's May 30 referral request. Accordingly, the Board remanded the case with instructions to the judge to resolve whether the May 30 conversation occurred and whether Murphy specifically stated that the Respondent should call Phares back to work as an oiler.

In his supplemental decision, the judge found that the conversation in question did not take place. Nonetheless, the judge concluded that the Respondent violated the Act by refusing to recall Phares. The judge based this conclusion on his finding that the Respondent's practice was to transfer employees from job to job to avoid layoffs or to recall employees from layoff to perform jobs other than those to which they were originally assigned in order to keep its crew together. Because Phares was qualified to be an oiler, the judge found that the Respondent could, consistent with its past practice, have recalled him without asking the Union for a referral, and that by failing to do so, the Respondent engaged in unlawful disparate treatment of Phares.

We do not agree. Accepting the judge's credibility resolutions, the critical facts are as follows. Some agent of the Respondent other than Levell requested that the Union refer an oiler, the Union did not mention Phares, the Union referred Fickus, and the Respondent accepted the referral as it was contractually obligated to do in the absence of just cause to reject the person referred. Given the credited facts, the Re-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

There are no exceptions to the judge's finding that the Respondent did not violate the Act when it laid off employee George Phares on May 19, 1990.

[2] All subsequent dates are in 1990 unless otherwise indicated.

spondent had no contractual basis for recalling Phares because the Union did not refer him.

The judge's finding that the Respondent had a past practice of recalling laid-off employees rather than going through the Union's referral system is not supported by the record. While the record evidence shows that the Respondent shifted employees who were *already* on the job from one position to another to avoid layoffs, the record evidence does not establish that the Respondent recalled laid-off employees rather than seeking union referrals.[3] It is clear that Phares was on layoff when the Respondent sought a referral on May 30.

In sum, even assuming the General Counsel established a prima facie case that animus against Phares' concerted activities was a motivating factor in the Respondent's failure to recall him, we find that the Respondent prevails under the *Wright Line*[4] test because the record evidence establishes that it would have done so in any event. The Respondent was contractually obligated to act as it did, i.e., to fill the job in question through the hiring hall and accept the qualified individual referred (Fickus); and it had no past practice of bypassing the hiring hall to recall laid-off employees. We shall therefore dismiss the complaint.

ORDER

The complaint is dismissed.

[3] The judge found that the Respondent laid off employee Harold Davis and recalled him to an oiler position. The record does not support the judge's finding. Davis refused to perform other work for several days while his endloader was out of service. When he returned to work, he (with the Union's aid) received some pay for the days he did not work. The record does not show to what job he returned. Although he performed as an oiler temporarily at some time, the record does not show when this occurred. Given the sketchiness of the testimony concerning Davis, we are unable to determine whether he was in fact laid off.

Although the Respondent rehired employee Paul Canum, who had been terminated, it did so at the Union's insistence. Because the Union referred Canum, we do not believe that this example supports the judge's finding that the Respondent's practice was to recall laid-off employees without seeking union referrals.

In sum, neither Davis' nor Canum's situations establish a past practice of recalling laid-off employees rather than seeking union referrals. This is not surprising because the General Counsel introduced the evidence relating to a past practice to support the allegation that the Respondent violated the Act when it laid off Phares on May 19. As noted above, there are no exceptions to the judge's dismissal of the unlawful layoff allegation.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Deborah A. Fisher, Esq., for the General Counsel.
Gerald Tockman, Esq., of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on charges filed by George Phares, an individual, on June 14 and July 5, 1990,[1] the Regional Director for Region 33 issued a consolidated complaint and notice of hearing alleging that Anderson Excavating and Wrecking Company (Anderson or Respondent) laid off and thereafter refused to rehire Phares in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (Act). Respondent filed a timely answer admitting the jurisdictional allegations and certain factual allegations of the consolidated complaint, but denying that it committed any unfair labor practices.

Hearing was held in these matters in Springfield, Illinois, on January 24, 1991. Briefs were received from the parties on or about April 1, 1991, and a response to Respondent's brief was filed by the General Counsel on or about April 12, 1991. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Nebraska corporation with an office and place of business in Omaha, Nebraska. As pertinent, at all times material to this decision, it engaged in a job at Springfield, Illinois, involving the demolition of buildings and other structures at the Fiat-Allis plant. Respondent admits the jurisdictional allegations of the consolidated complaint and I find that it is now, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that Operating Engineers, Local Union No. 965 (Union) is now, and has been at all times material to this proceeding, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaint raises three issues for determination in this decision.

1. Whether Respondent laid off George Phares on May 21 because of his protected concerted and union activities in violation of Section 8(a)(1) and (3) of the Act.

2. Whether Respondent refused to rehire George Phares on May 30 because of his protected concerted and union activities in violation of Section 8(a)(1) and (3) of the Act.

3. Whether Respondent refused to rehire George Phares on June 29 because of his protected concerted and union activities in violation of Section 8(a)(1) and (3) of the Act and because he filed a charge with the National Labor Relations Board (Board) in violation of Section 8(a)(1) and (4) of the Act.

[1] All dates are in 1990 unless otherwise noted.

A. *Background*

Anderson, who is in the business of demolishing buildings, power plants, and bridges, was engaged to demolish the Fiat-Allis plant in Springfield, Illinois, beginning in February 1990. Respondent Vice President Lanny Levell was in overall charge of this project, which was supervised on a day-to-day basis until late July by Job Superintendent Mike Anderson. On March 2, Respondent signed a collective-bargaining agreement with the Union applying only to the Fiat-Allis project.[2] The Union operates an exclusive hiring hall, and with the exception of three company men cleared in by the Union, namely, Mike Smith, Reid Loffelmacher, and Kenny Shirley, Respondent has been required under article III-A of the contract to obtain all of its Operating Engineers employees from the Union's hiring hall.

Under the Union's operation of its hiring hall, applicants are registered for referral on the ''referral register'' and are referred out in order of registration or ''re-registration,'' taking into account the applicant's seniority status and qualifications to do the work required. These qualifications are set out in the Union's ''Qualifications Book'' maintained on each of the Local's members. In making requests for referrals, Respondent could not ''name request'' any particular union member for referral. The Union's referral obligation is to refer out from the list the most senior applicant competent to fulfill the requirements of the positions sought to be filled.

Union Business Representative Charlie Murphy testified that Levell, prior to signing the collective-bargaining agreement on March 2, met with him twice. The first time Levell met with Murphy and Union Financial Secretary John Hudson, and Levell explained what was involved in the Fiat-Allis project. The next meeting took place with Levell, Mike Anderson, Union Business Manager Hugo Zahn, and Murphy present. Murphy testified that the subject of oilers was discussed, and according to Murphy, the Union told Levell that he would have to have oilers on a certain class of machinery operated by Respondent. Levell objected stating that he had not figured this cost into the bid on the project. Murphy testified that the Union stood by its position.

Murphy testified that the next meeting with Levell was on March 2, at which time Levell signed the collective-bargaining agreement. Murphy testified that Business Manager Zahn, Levell, Mike Anderson, and himself were present for this meeting.[3] At this meeting the Union agreed to clear in certain of Respondent's operators which it wanted to bring on to the job. According to Murphy, there was no discussion of any of Respondent's mechanics doing repair work on equipment without the oilers and operators being present, and there was no agreement with Murphy or Zahn that mechanics could repair equipment without the operator and oiler being present.

However, Levell testified that he and Hugo Zahn agreed that the Respondent's mechanic could work on equipment without the oiler and operator being present or paid if the repair work was done after working hours. I believe that Levell and Zahn did have a side agreement as testified about by Levell. As noted in the footnote above, Murphy may not have been at the meeting and Zahn did not deny Levell's assertions in this regard.

B. *Was George Phares Unlawfully Laid Off on May 21*[4]

On April 19, the Respondent sent the Union a written request for an operator for a 50-ton Lima truck crane. Murphy referred Phares, a member of the Union's executive board, to fill this position.

Between the date of his employment and May 19 or 21, when he was laid off, Phares asserted certain rights under the collective-bargaining agreement on behalf of himself and coworkers. It is the General Counsel's contention that these incidents irritated Respondent sufficiently to motivate it to lay off and then refuse to recall Phares. Each of these incidents will be addressed briefly below.

l. The matter of pay for work not performed

Phares began working for Respondent on Friday, April 20. When Phares reported to work on April 20, he and his oiler, Jack Fillbright, began assembling the Lima truck crane. Phares and Fillbright went home between 1 and 2 p.m. that day because it started raining and because after they got the truck crane put together, they found that a point section on it was bent.

On Monday, April 23, Phares turned in his timecard for Friday, April 20, and recorded his hours of work on April 20 as from 7 a.m. to 3:30 p.m. Job Superintendent Mike Anderson came to Phares and asked if there was some type of law which he did not know. Anderson said that he had seen Phares timecard and that Phares had requested 8 hours for April 20 although he had gone home early. Phares explained that according to the contract with the Union, if an employee starts to work and performs work on the first day of the job, he is to be paid for 8 hours. Phares testified that he based his claim for 8 hours' pay on article XI of the contract. Respondent paid Phares as he requested.

2. The matter of pay for oilers and operators for mechanic's work

As noted above, Levell and Zahn entered into a side agreement at the time of the signing of the collective-bargaining agreement whereby the cleared-in company mechanic could work on equipment without the equipment's operator and oiler being present and paid as the contract called for. The existence of this agreement was not known by Murphy or Phares. On Tuesday, April 24, Phares and his oiler began assembling a Northwest crane with an attached breaker ball to break concrete. Phares testified that on that date, he ob-

[2] This collective-bargaining agreement contains a complete grievance and arbitration procedure in art. VII. This article provides for binding arbitration of any grievance arising under its terms. There is absolutely no reason why any of the events complained of in the consolidated complaint, save for the alleged (8)(a)(4) violation, could not have and should not have been handled under the grievance procedure. Certainly, the first two issues raised by the complaint should have been deferred by the Region when the charge was filed. In any event, credibility is a major issue in this case and I draw an adverse inference from the failure of the Charging Party and the Union to process the matters complained of under the grievance procedure.

[3] Curiously, although Zahn and two other union officials signed the collective-bargaining agreement, Murphy did not. This leads me to question whether he was actually present for this meeting.

[4] I believe that Phares was laid off on May 19, but the fact of the layoff was not communicated to him until May 21.

served two men taking the tracks off of an endloader which was assigned to union operating engineer Harold Davis. Davis was not working that day. After making this observation, he had a conversation with one of the men. Phares asked if the man had a union card and was told that he did, but that it was in Omaha, Nebraska. Phares told the man that without his card and without being cleared by the Union, he was not authorized to work at the site and must cease work. Phares based his statements on article III–A of the contract.

Phares testified that after this conversation with the mechanic from Omaha, he met with Mike Anderson. Phares asked Anderson about the men he had seen, telling him they did not have union cards and had not been cleared to work on the job. Anderson responded that he had not hired the men. Phares then asked to use the Respondent's phone to call the union hall. Anderson said he was expecting a call, and for Phares to go outside to make the call. Phares then went to a nearby shopping center and called Murphy, asking him if any other men had been cleared in to work on the job other than the three agreed on before work began on the project. Murphy said no. Phares then returned to the job and sought out Anderson, reiterating his position that the men should cease work. In response, Anderson called Levell and gave the phone to Phares. In a brief conversation, Levell told Phares that he was not paying him for time spent calling the union hall.

When Phares reported to work on April 25 at about 6:45 a.m., he saw Reid Loffelmacher welding on the crane which Phares and his oiler had been assembling. He also observed mechanic Kenny Shirley on a forklift holding up a boom while. Loffelmacher welded on it. Phares spoke to Loffelmacher and asked him what time he had started. Loffelmacher replied about 6:30 a.m. Phares then had a conversation with Anderson, telling him that according to the contract, no repair work was to be done on the crane with the operator and oiler being present and being paid. He claimed that he and his oiler should therefore be paid for the day beginning at 6:30 a.m., when the repair work commenced in their absence. Phares based his claim on article XIV of the contract. Respondent paid as requested.

Phares testified that at about 10:30 a.m. on April 25, he went to check on the Omaha mechanics he had seen on April 24 and found they were still working on the job. He then went to Mike Anderson, and told him that they should cease work. Anderson refused to comply with this request. Phares returned to work, but called Murphy on his lunchbreak and reported the incident. Murphy testified that he received this call and in response, went to the jobsite and talked to one of the involved mechanics, Rich Carlson. Murphy asked if Carlson was a union member and was told he was a member of the Omaha local.

Murphy then met with Anderson and told him that Carlson could have charges preferred against him by the Union for working on the job without clearance. Anderson told him to do what he had to do and that he would contact Levell, who was out of State, and straighten the matter out. According to Murphy, he then checked with the Union's Omaha local and learned that Carlson had taken a withdrawal from that local. Murphy then called Levell who was in Virginia and explained the problem to him. Murphy testified that he also told Levell that the Company's mechanic was working on equipment with the operator and oiler being present. Levell said he would be at the jobsite the following Monday and would meet with Murphy about these problems.

Murphy testified that the two did meet the following Monday and according to him, Levell agreed to pay operator Harold Davis and oiler Freddie Phillips for times when the mechanic worked on their assigned equipment in their absence. Davis testified that he was paid for 2 days in late April when the mechanic worked on his equipment. Without elaborating, Levell said there was more to the discussion than the above and that the payment for 2 days to Davis was a payoff to keep the job going smoothly.

Shortly after this meeting Phares was appointed union steward on the project.

Phares testified that on May 16 or 17, Paul Canum, the oiler hired to replace Phillips, reported to him that someone had repaired his equipment overnight in his absence. Phares reported this incident to Murphy. On May 18, Murphy came to the jobsite where he, Levell, and Phares discussed this ongoing dispute. Levell contended that he had an agreement with Union Business Manager Zahn that the company mechanic could work on the equipment without the presence of the operator and oiler. Phares said he was unaware of any concessions and was going by the contract. According to Phares, Murphy was also unaware of any concessions in this regard, but told Levell he would check with Zahn.

According to Phares, Murphy had a conversation with Zahn, who though not remembering making concessions to Levell, nonetheless agreed that the company mechanic could repair machinery 1 hour a day, 3 days a week, without the necessity of the oiler and operator being present. Murphy reported this concession to Levell and told him to work with Phares on this matter.

3. The matter of pay for a discharged employee

In mid-May, Respondent fired oiler Freddie Phillips. In June, when Phares filed a charge with the Board over his layoff and Respondent's alleged refusal to rehire him, he also alleged that the termination of Phillips was unlawful. After an investigation, the Region decided otherwise and dismissed the charge. However, shortly after the discharge, a problem arose with respect to the amount of money Phillips should receive upon termination. Phares testified that late in the day of May 11, Phillips came to the jobsite with a problem about the amount of his final check. Phares took the matter up with Anderson. According to Phares, this took several conversations and Anderson told him he should be working, not going back and forth to Phillips. Phares replied that he was doing what his steward duties required. Anderson paid Phillips the money requested.

In the last conversation that day about the Phillips matter, Phares informed Anderson that even though Phillips had been fired, the Respondent could not operate the equipment to which Phillips had been assigned as oiler until a new oiler was hired. According to Phares, Anderson got upset and stated that he could not afford to have this piece of equipment idled.

4. The matter of a day's pay for a partial workday and Phares' layoff

On Thursday, May 17, Phares operated and Davis oiled the Northwest crane and breaker ball. The pin on the drive

chain broke twice that day making the machine inoperable. Levell testified that he did not hold Phares responsible. The part necessary to fix the machine has been available at the jobsite since late May; however, this machine has never been put back in service. Levell testified that when the Northwest crane broke, Phares asked when the Lima truck crane, which had been taken out of service, was going to be put back in service. Levell testified that he asked Phares if he was going to ''claim'' the Lima truck crane and Phares said yes.

Article XII of the contract provides, as pertinent:

> An employee who is laid off may claim preference on the machine he was employed to operate for a period not exceeding thirty (30) days provided, he does not register for work with the Union Referral Office, and shall be recalled if that machine performs any work on that project prior to the end of 30 days. At the time of lay-off, the Employer shall advise the employee if there shall be any work for that machine in the next 30 days and the employee shall inform the Employer if he claims preference for the 30 day period.

Levell then advised Phares not to claim the Lima truck crane because it was going to do very little work on the project after the overhead cranes were taken down. According to Levell, he told Phares that the Northwest crane with breaker ball would stay on the job and continue to break concrete. Levell testified that he believed that Phares did claim the Northwest crane, but conceded that there was nothing to preclude him from putting Phares on any piece of equipment if that equipment was not being claimed by someone else.

At about this time, two pieces of equipment were apparently going into service which Phares might operate while his Northwest crane was out of service. One was second Northwest crane with a magnet attached and the other was a backhoe with a large shear attached. This latter piece of equipment will be referred to as the ''shear.'' The second Northwest crane with a magnet attached was placed in service at the end of June.

Another employee, Harold Davis, was present for the conversation between Phares and Levell about claiming equipment. According to Davis, Levell told Phares that another piece of equipment, the shear, would be available, that there was a lot of work for the shear, and was Phares interested in trying to work with the shear. Phares told Levell that it had been several years since he had been on a large backhoe such as the one involved. Levell suggested that Phares give the backhoe with shear a try. According to Davis, Levell also said he would be setting up a magnet crane and said that if Phares wanted to run it, he could. Levell testified that Phares advised him that he had never operated a crane with a magnet attached. If a person is unfamiliar with the operation of the magnet, there is the very real danger that damage can easily be done to the magnet's switch, costing thousands of dollars to repair.

On May 18, a second shear was added. The first shear on the job had been operated by cleared-in employee Mike Smith. Levell decided to try Phares out on this second shear, and testified that he felt obligated to call Murphy for his approval of this tryout. Murphy denied that anyone asked for his approval of this arrangement, and Respondent evidently never asked for such approval before switching operators from one piece of equipment to another. On the other hand, as will be discussed, Murphy did come to the jobsite and with Levell, jointly observe Phares' operation of the shear.

On Friday, May 18, Phares began operating the shear with Davis as his oiler. According to Phares, he got on the backhoe with its regular operator, Mike Smith, who continued to operate it for about 5 minutes with Phares present. Smith briefly gave Phares instructions on how to operate the equipment and then left. According to Phares, Smith did not spend any further time with him and did not say anything further to him about the operation of the equipment or give him further assistance, nor did anyone else. Levell testified that he tried to ride on the shear with Phares, but Phares' operation of the machine was so rough he could not hang on to the side of it. Levell also testified that he attempted to explain to Phares how to operate the machine. I credit Levell's testimony in this regard. This was the usual way the Respondent broke an employee in on a new piece of equipment, and at this time, Respondent did not appear to harbor any ill will toward Phares, as it was attempting to keep him employed though his regular machine was not in service. I do not believe that any failure of Respondent to properly train Phares on the shear was discriminatorily motivated.

Levell testified that he considered Phares' operation of the shear to be unsatisfactory in that it was too rough and potentially dangerous. Murphy, who also observed Phares on the shear testified that he told Levell that Phares was tentative and slow on the machine. After Phares was laid off, Levell commented to Davis that Phares was too slow in his operation of the shear.

On May 19, Phares operated the backhoe with shear from 7 until 11:30 a.m. Phares testified that although it did rain that day, they continued to work and they were not rained out. According to Phares, as he was going to what he thought was lunch, another operator told him that they were just working a half day. Phares then went to the office to talk with Levell. Harold Davis and Mike Smith were present for parts of the conversation that ensued between Phares and Levell.

Phares testified that when he asked Levell if they were working a half day, Levell confirmed that to be true. Phares then explained to Levell that according to the contract, if they worked past 4 hours, unless they were rained out or a machine broke down, they were supposed to be paid for 8 hours. Phares testified that Levell started screaming that Phares was nitpicking him to death with union rules and that he was not going to pay the 8 hours. Levell said that although he had thought that Mike Anderson was the problem on the job and he was going to replace him, he had decided that Phares was the problem. According to Phares, Levell said that he wanted them to put up a picket. He said that he would bring in his nonunion company in the back gate and would drive in the front gate and ask people on the picket line how much money they had made that week. Levell said that he would only work operators part time and that 30 hours a week would be the most that any operator would get. Levell said if they put up pickets, the Laborers would cross the picket line because his company had an international agreement with them. He said that their company had been a union company for years and that his brother had blown up trucks of nonunion companies. As employees were leav-

ing, Levell said that he would have to get them back if he had to pay them the 8 hours. According to Phares, he told Levell that they were not going to press the contract on paying everybody 8 hours that day but he wanted him to know that it was going to be in effect. Phares testified that Levell finished the conversation by saying, ''We'll see what happens Monday.'' Phares then left. According to Phares, Levell's voice got louder, and he paced back and forth and waved his arms in an agitated way throughout this conversation. Phares testified that he based his claim to Levell about pay for part days on article XI of the contract.

Davis testified that he heard Levell say that ''he was sick and tired of all the nitpicking and he wasn't going to have it anymore, that the nitpicking just had to come to a cease.'' According to Davis, Levell said that ''they were going to run the job without us guys telling them what to do.'' Levell listed three alternatives. Levell said that if they wanted to strike the job to go ahead and strike it. He said that he would go in the back door and complete the work with his nonunion company. As a second alternative, Levell said that if they did not want to fall in line, he would do what he had done in Local 649; he would call the union hall, have an operator show up, tell him that there was no work, and just drag it out until they got the message. Levell said that he could also bring double sets of machines in, work operators 2 or 3 days, lay them off and call another crew in for 2 or 3 days. Davis described the conversation as one in which Levell spoke in a stern tone which got their attention. According to Davis, Phares explained to Levell that he had people to whom he had to answer and that he was trying to get some problems solved. Davis testified that Levell said that he thought that Mike Anderson was the problem on the job and now he was not so sure. Levell said that the Company in earlier days was a staunch union supporter and at one time, his brother, Jack Levell, had blown up some machines to get union contractors in line who were wandering from the fold.

Levell did not deny Phares or Davis' description of this conversation. Levell had to leave the hearing before its conclusion and was not present after this testimony as well as that of Murphy was given. Based on my observation of Levell when testifying, I have serious doubts that he made all the statements attributed to him in this encounter. However, regardless of what was actually said by Levell, it is clear that he was very irritated by Phares' claim for more money on May 19.

May 19 was Phares' last day on the Respondent's project. The entry in the daily log for May 19 states that Phares was ''laid off today, crane is broke.'' According to Levell, as Phares' regular crane was out of service and there was no other work available for Phares except on the shear, he laid off Phares on May 19 because he ran the shear too roughly and too dangerously and he could see that Phares was going to cost his company too much money.

At 6:15 a.m. Monday, May 21, Phares received a phone call from Levell. Phares testified that Levell told him that he did not have any work for him that day. According to Phares, Levell did not tell him that he had not worked out on the backhoe or that he was being laid off. After Levell's call, Phares went to the union hall. He was at the hall when a referral request was received from Respondent for an operator for the shear. Phares told Murphy that Respondent had called him and told him that they did not have any work for him.

According to Phares, about 6:15 a.m on May 22, he received a call from Mike Anderson. Anderson told him that they did not have any work for him that day. Anderson also called Phares on May 23, 24, and 25 and told Phares the same thing. On Friday, May 25, Phares went to the jobsite to pick up his paycheck. At that time, Anderson told him that he would give him a call the following Tuesday and let him know if he had any work for him or not. After the conversation on May 25, Phares never heard from either Mike Anderson or Levell. He contends he was never told he was laid off. I believe that there may have been some confusion in Phares' mind on this point because Respondent continued to call him on a daily basis for several days. However, the fact of his layoff must have become obvious when Respondent requested an oiler on May 29 or 30, a position for which Phares was qualified.

Union Business Agent Murphy testified that on Monday, May 21, Phares came to the union hall and told him that Respondent had laid him off and did not have any work for him. After Phares reported this to Murphy, Murphy went to the jobsite where he had a conversation with Levell. Murphy testified that he asked why Phares had been laid off. According to Murphy, Levell said that they had worked a half day that was one-half hour past the lunch hour on Saturday but that Phares was not aware that it was going to be a half day. According to Murphy, Levell told him that Phares said he would have to pay employees according to the contract for an 8-hour shift. Murphy testified that Levell became upset and told him if he caught any more people reading that agreement he was going to fire them. Levell also told Murphy that they were in no hurry to fix Phares' crane. As noted above, Levell left the hearing before this testimony and did not deny this conversation.[5]

Was Phares' layoff discriminatory? The Board set forth in *Wright Line*, 251 NLRB 1083 (1980), the causation test to be used in all cases alleging discriminatory discharges or layoffs. The General Counsel must make out a prima facie showing that protected conduct was a motivating factor in the employer's decision; the burden then shifts to the employer to demonstrate the same action would have taken place even in the absence of protected conduct. Phares did engage in protected conduct in seeking to enforce the contractual provisions and such activity did irritate Levell. The timing of Phares' layoff, coming immediately after his latest assertion of a costly claim against Respondent and Levell's being upset by it, certainly supports the General Counsel's position. Phares' protected activity prior to May 19 does not appear to have upset Respondent as it tried him out on the shear when his regular machine broke. It could have laid him off at that time if it were looking for a reason to get rid of him.

[5] Levell did testify that he believed that Phares had ''claimed'' the Northwest crane with an attached breaker ball. Thus, for 30 days, Respondent believed it was obligated to reassign Phares to this piece of equipment if it was put back into service in that timeframe and Phares did not reregister for work at the union hall. However, as noted earlier, even if Phares had claimed the Northwest crane, there was no contractual prohibition against assigning Phares to operate or oil another piece of equipment if it was not claimed by another operator and if Phares was qualified.

Based on the timing of the layoff, the veiled threat made to Phares by Levell on May 19, and Levell's statement on May 21 to Murphy about firing any employee who read the contract, I find that General Counsel has made the requisite prima facie case under *Wright Line*, supra. On the other hand, I believe that Respondent has demonstrated that it would have laid off Phares even in the absence of his protected activity. Respondent demonstrated that at the time of his layoff there was no other work available except as the operator of the shear. It did not use Phares' Northwest crane again on the project nor did it employ another crane to do what Phares had been doing, breaking concrete with a breaker ball, until October.

I also believe the best evidence demonstrates that Phares did not perform adequately on the shear. I have considered the testimony of Phares, Davis, Murphy, and Levell in this regard. As noted earlier, even Murphy testified that Phares was slow and rough on the shear. Although Phares gave some excuses about his operation of this piece of equipment, he did not file a grievance over his being taken off it.

Therefore, I find that there was no work for Phares for which he was qualified after May 19 until May 30 and do not find that his layoff during this period was in violation of the Act.

C. *Did Respondent Unlawfully Refuse to Recall Phares on May 30*

Murphy testified that on May 30 he received a call from Levell requesting an oiler for the backhoe with shear. When Levell asked for the oiler, Murphy told him that Phares was laid off and that he should call Phares back because he was still signed out with Respondent. Levell said he would not hire Phares as an oiler because he was an operator. Murphy asked Levell if that was his way of slapping Phares' hands. According to Murphy, Levell did not respond. After this conversation, Murphy sent Elmer Fickus to fill the request for an oiler. As Levell did not testify after Murphy, he did not deny having a conversation with Murphy on May 30, and did not deny the conversation as testified to by Murphy. On the other hand, Levell was shown in the General Counsel's questioning to be in Washington, D.C., on May 30 and it is difficult to believe that he, rather than Anderson, called the union hall to place a routine request for another oiler. In any event, the fact remains that on May 30, an oiler was requested and Phares was qualified to be an oiler.

Phares was not referred out to the project by the Union and the Respondent had no contractual obligation to recall him for the oiler position. However, after careful review of the evidence, I find that by not recalling Phares to the oiler position, Respondent acted contrary to its employment policy and past practice without any rational explanation. Absent such explanation, one can only assume that the discriminatory motivation which was existent at the time of Phares' layoff had not abated.

It was demonstrated in the record that Respondent's policy was to keep employees referred to its project on the project unless they were fired. As will be shown below, operators were shifted to oiler positions when their equipment broke or was taken out of service and operators and oilers were shifted from one piece of equipment to another almost routinely. According to Levell's testimony, it is in the Respondent's best interest to keep its employees working once they have been trained. He also testified that the normal practice when equipment breaks down is to find other work for the affected operator and oiler ''most of the time, just in certain circumstances.''

With the exception of Phares, who was characterized by Levell as an excellent crane operator, Respondent generally followed this stated policy.

From April 20 through the time that oiler Jack Fillbright went on his vacation the week of May 14, he had oiled for George Phares on the Lima truck crane and the Northwest crane. From May 22–30 when Fillbright quit, he oiled for Robert Degner[6] on the shear. Fillbright was replaced as Degner's oiler by Elmer Fickus who worked for Respondent through July 19. When the drive motor went out on the shear, Fickus and Degner were assigned to the Koering crane, but on the Koering crane, Fickus was the operator and Degner was the oiler. Fickus also operated the Northwest crane with Degner working as his oiler.

Mike Smith ran the shear from the time he began working for Respondent until it broke down in late October or early November. At that time a Komatsu hoe was brought to the job, and Smith began running this piece of equipment. During this period of time, Degner was operating a second shear. When Degner's shear was subsequently shipped to another job, Degner began operating the Komatsu hoe which Smith had previously operated and Smith returned to operating his shear.

Levell testified that rather than lay Degner off when there was no work for his shear, he tried to give him work by having him run the Northwest crane. Degner also operated the forklift. During the course of Degner's employment, he not only acted as the operator of the shear, Komatsu hoe and forklift, but he also oiled on both the Northwest and Koering crane.

According to Levell, Degner was the only employee other than Phares who was laid off because there was no work for his machine. Levell testified that Degner was laid off on December 11 because they were getting short of work to keep all the equipment going. The job was originally scheduled to be completed by December 1, and Steve Roberts, who began working for Respondent on October 8, was the last operator Respondent requested from the Union.

Ralph Booth was hired as a crane operator on July 18. He operated the Lima truck crane, the Northwest crane with a magnet and with a ball, and the Koering crane with a magnet and a ball. Levell testified that a magnet crane can be damaged if the switch is left on for more than 2 minutes. According to Levell, Booth in fact burned out the switch on the Koering magnet crane by leaving it on too long. No action was taken against him. In accord with Levell's stated policy of finding other work for his employees when their equipment breaks down, Booth was then transferred to operate the Northwest crane with the magnet.

Paul Canum replace Freddie Phillips as the oiler on the shear afte Phillips was terminated. Canum was later fired after he tore out the gear box on the shear. However, Levell rehired Canum on October 12. According to Levell, he rehired Canum after Charlie Murphy asked him if he was going to put Canum back to work and after he had discussed

[6] Degner was the employee referred by the Union on May 21 to replace Phares in the operation of the shear.

it with Mike Smith, the backhoe operator. During Canum's employment with Respondent, he oiled on both the Komatsu hoe and the shear.

Barney Ferguson worked as an operator, and Bob Mathon worked as his oiler. During the period May 21 through their termination on June 28, it appears that from the daily log that Ferguson operated and Mathon oiled on three different types of cranes.

Harold Davis was laid off for a period of time when his endloader has been broken down and he refused an offer to operate a crane. However, he was recalled to oil for the crane which Phares operated.

With respect to company policy about replacing temporarily missing operators or oilers, Phares testified that in a conversation with Levell, Levell said that rather than call for a new hire for 1 or 2 days, he preferred to keep the people he started with and just switch them around. Harold Davis testified that he was present for this conversation and remembered Levell saying that he did not like to call the union hall to replace an oiler or operator for a day or two, but liked to keep a crew working every day.

Given Respondent's policy and practice of shifting employees from machine to machine and from the operator position to oiler position and back again to keep its crew together, Levell's statement that he did not recall Phares to oil because he was an operator just does not ring true. Although Respondent credibly asserted that Phares was not qualified to operate the shear, and feared he was not qualified to operate a magnet crane, there is no evidence to show there existed any doubt about his qualifications to oil the shear. I do not credit Respondent's contention that it could not have violated the Act by not recalling Phares on May 30 because it had no contractual obligation to do so. Its past practice and policy dictated that it would have recalled him to oil on that date had it not had a reason for not wanting him back on the project. The only reason discernable from the evidence for not wanting Phares is Respondent's unhappiness with Phares' protected activities. Consequently, I find that Respondent, by not rehiring Phares to oil on May 30 violated Section 8(a)(1) and (3) of the Act.[7]

D. *Did Respondent Unlawfully Refuse to Rehire Phares on June 29 Because of His Protected Activities, Including His Filing of an Unfair Labor Practice Charge*

On June 14, Phares filed a charge with the Board against Respondent alleging it unlawfully laid him off on May 21 and unlawfully refused to recall him on May 30. The complaint also alleges that Respondent unlawfully refused to rehire him on June 29 because of a continuing discriminatory motive and because Phares filed the charge on June 14. I have found above that Respondent violated the Act by not recalling Phares on May 30 and as this violation was a continuing one until the project was completed, I consider the matter of refusing to rehire him at a later date to be a moot point. In the interest of making a complete decision in the event that my finding of this violation is overturned, I will address the alleged refusal to rehire on June 29. On June 28, the Respondent requested that the Union supply it with an oiler and an operator for a Northwest crane. The crane operator was required to be qualified to operate a magnet attachment for the crane. Phares showed up at the Respondent's jobsite on June 29 purportedly with a referral for the position of crane operator. Although not discussed by the parties at the hearing, I believe that Respondent had an obligation to recall Phares for the oiler position just as it should have recalled him on May 30. I do not believe it was required to recall him for the crane operator position, based on what I find to be credible doubts on Respondent's part regarding Phares' qualifications to operate a magnet crane. I also find that Phares was not properly referred for the operator position and do not believe that he was told he was denied work on June 29 because he had filed a charge with the Board.

Phares and the Union contend that Phares was referred to the Respondent to fill the operator position on June 29. As General Counsel's Exhibit 5(d) was introduced as a union requisition for referral form dated June 28 purportedly referring Phares to Respondent to fill the position of operator—Northwest Crane. The form also notes that the person referred must be qualified on magnet and steel. The form is initialed by Murphy.

As General Counsel's Exhibit 5(t) was introduced, the same form, but without Phares' name, Murphy's initials, or the qualification about magnet and steel filled in.

Neither variation of this referral form was supplied to Respondent as part of a sworn reply to interrogatories by Zahn in a Federal district court lawsuit Respondent has filed against the Union. The interrogatories required that the referral forms for all persons named in the interrogatories, including Phares, be supplied. None of the standard entries in the Union's other books documenting referrals notes the purported Phares' referral. Zahn testified that the information contained on the referral forms is entered into a permanent ledger on the date the referrals are filled out. Yet the Union's ledger shows no referral of Phares to Respondent on June 28. It does reflect the referral of an oiler to Respondent on that date and of an operator named Charles Copley to fill the operator position on June 29. Zahn also testified that the normal practice when a referred employee is rejected by an employer is to simply cross his name off the referral form and put another persons' name on it, not prepare a new form. This was not done in the case of Phares' alleged referral. For that matter, it is my understanding of the referral process that Phares could not have been referred to the job on June 28, as he was not listed on the out-of-work list. He could not have been referred on June 29 until after he reported being out of work and then was the most senior union member qualified for the job referral.

Because of the evidence set out above, I was of the opinion at the hearing and am still of the opinion that General Counsel's Exhibit 5(d) was not an actual referral and was instead partly manufactured to bolster the Charging Party's position in this proceeding. I will set out the evidence presented by Phares and the Union in this regard because it is my find-

[7] I am not sure whether there is any practical consequence to this finding of a violation. Phares was aware on May 30 that he was laid off, and must have been aware after that date that Respondent was not willingly going to rehire him. Therefore, I believe that on and after May 30, he had a positive duty to seek other work by reregistering at the Union's referral office. The Union's records will show when he would have been referred to another employer or back to Respondent's project as it uses a rather mechanical formula for referrals. As will be discussed below, I find that he was never properly referred back to Respondent.

ing with respect to the legitimacy of General Counsel's Exhibit 5(d) that I make credibility findings adverse to Phares and the Union on the issue of whether Respondent violated Section 8(a)(4) when it did not hire Phares on June 29.

Phares testified that on June 28 he was present at the union hall. On that date, he provided an affidavit to counsel for General Counsel concerning the charge. Phares testified that while he was giving his affidavit, the Union's financial secretary interrupted and said he had two requisition forms, one for an oiler and one from Respondent for an operator of a Northwest crane. The crane operator had to be qualified on magnet and steel. According to Phares, he was shown the requisition forms and, at that time, the forms had been filled out except for the portion of the forms requesting the names of the employees referred. According to Phares, he asked for copies of the forms and they were supplied to him and to counsel for General Counsel, who was present. Later on that day, Phares talked with Murphy, who mentioned the possibility of him going back to Respondent's job since he was still signed out to Respondent. Murphy told Phares that he would talk to Hugo Zahn and that he would call Phares later and let him know what Zahn thought. Phares testified that he later received a call from Murphy who told him that he should go back to the job on the crane since he was still signed out to Respondent. According to Phares, he was referred by his business agent to Respondent's job to operate the crane pursuant to the referral request for a crane operator which he had seen earlier.

Murphy testified that at 12:37 p.m. on June 28, the office secretary at the union hall took a call from Respondent for an operator and an oiler for a Northwest crane with a magnet. Murphy testified that he referred George Phares pursuant to Respondent's request for an operator and completed that portion of the referral requisition form requesting the name of the employee referred to the job. Murphy wrote Phares' name and seniority number and his initials on the form. Murphy testified that he referred Phares to fill the position for which Respondent requested an operator and referred Huey Lyons to fill the requested oiler position. According to Murphy both Phares and Lyons were to report to the job on June 29.

Business Manager Hugo Zahn testified that employees obtain referrals from the hall as a result of an employer's request. Normally an employer makes its request by telephone. Whoever from the hall takes the employer's telephone call, fills out a requisition for the job, and then the business manager or one of the business agents actually refers the employee out. At the time at which the call comes in, the date, the time the call comes in, the employer's name, the work for they are requesting the employee, the date and time that the employee is to report and the location of the job are completed on the requisition form. Until a referral is actually made, the employee's name and the referring business agent's name or initials do not appear on the requisition for referral.

Zahn testified that when an employer's call comes in and a requisition for job referral form is completed, the requisition for referral is put in a drawer and kept there until about 3 p.m., at which time the Union begins contacting its members and making referrals. Once the requisition for referral form is completed and filled out and the referral is made, the form and the employee's qualification record are laid aside until all the jobs for the day are filled. Then the information is transferred to another record which contains the name of the employee who was sent, the employer to whom he was sent, for what job he was sent, and the date and time that he was sent. The information is also put on the employee's employment record. The requisition for job referral form is then put on a clipboard with two posts which is kept in the referral office. The referrals are kept on that clipboard until they build up about 2 inches and then they are transferred to a box.

Zahn had no explanation why the purported referral of Phares was not supplied to Respondent in connection with the sworn answer to interrogatories he filed in the Federal lawsuit except that it may have been overlooked. Likewise he had no explanation for why the record of the referral does not appear on any of the other union records.

I do not doubt the authenticity of General Counsel's Exhibit 5(t), the partially filled out referral form, nor do I doubt Phares' testimony about how he received a copy of this form. I do not doubt that Phares reported to Respondent's jobsite on June 29 seeking employment as the crane operator in response to the referral request. Whether this was done with or without Murphy's approval, I am not sure. However, what I object to in this matter is the attempt by the Union and Phares to pass General Counsel's Exhibit 5(d) off as a legitimate referral prepared in the regular course of business. It obviously was not and the attempt to make it seem so calls into serious question the credibility of the witnesses for the Charging Party on the remainder of the evidence offered about refusal to rehire on June 29 which is set out below.

Phares testified that on June 29 he reported to work at Respondent's job at 6:45 a.m. and had a conversation with Mike Anderson in the office. Harold Davis was also present during this conversation. According to Phares, Anderson told Phares he could not work for him because he had a claim against them. When Phares asked Anderson if he was refusing to hire him, Anderson stated that the crane was not fixed. Phares then went to the union hall and reported out of work. He testified that he told Murphy about what had happened and Murphy replied that he had expected it. According to Phares, at about 7:50 a.m. on June 29 while he was at the union hall, the hall received another request from Respondent for a crane operator.

Harold Davis testified that in the Anderson-Phares' conversation on June 29, Anderson told Phares that he could not work there. Phares asked if he was refusing to hire him and Anderson said, ''Yes, you can't work for the Company, you got a lawsuit against the Company, and we can't hire you.''

Charlie Murphy testified that at 7:50 a.m. on June 29 he received a call from Mike Anderson. According to Murphy, Anderson said they could not hire Phares because he filed charges against the Company. Murphy told Anderson that he would send him another operator. Murphy then referred Charlie Copley to operate the Northwest crane for Respondent.

Murphy testified that on June 29 after his conversation with Mike Anderson, he also received a telephone call from Levell. According to Murphy, Levell asked why they sent Phares back to the job, and Murphy replied that Phares was still signed out to the Company and was a qualified crane operator. Levell told Murphy that he had told him in a previous conversation not to send Phares to the job, that they

would call Phares back when they were ready, and that Phares' crane was still not repaired.

Mike Anderson testified that on approximately June 29, he requested the Union refer to it a person qualified to operate a magnet crane. Anderson testified that it was at this time at which he had called for a magnet crane operator that Phares came to the jobsite. According to Anderson, Phares appeared on the jobsite on June 29, and he asked Phares what he was doing there. Phares replied that he had come to run the crane. Anderson testified that he told Phares that Phares had previously told Levell that he could not run a magnet crane. Anderson testified that he said that he could not put Phares to work because his crane was still broken. According to Anderson, Phares asked if this was because of the charge he filed and Anderson said no. Anderson was aware that Phares had filed such a charge.

On June 29, Phares signed the out-of-work list at the union hall and on July 2, was referred to another employer.

This case turns on credibility. Murphy, Phares, and Davis all testified that Anderson gave as the reason for not rehiring Phares his filing of a charge with the Board. Murphy's initials appear on General Counsel's Exhibit 5(d) and he does not deny that they are his. Thus, he played a part in its preparation and the introduction of false evidence in this proceeding. He also alleges that a damaging conversation with Levell took place on May 30, a date Levell was in Washington, D.C. Phares testified that he told Murphy about the reason for the refusal to rehire on June 29, but Murphy testified that he learned of it in a call from Anderson. The General Counsel asserts that the testimony of Harold Davis should be believed because he is still an ''employee'' of Respondent. The truth is that at the time of hearing the Respondent's project was almost complete and Davis was, is, and will remain dependent on the Union for future work.

Anderson appeared credible in his testimony about the conversation he had with Phares on June 29, and for that reason and because I have reason to doubt the credibility of the Charging Party's witnesses, I credit his testimony about this event.[8] Consequently, I do not find that Respondent gave as a reason for not rehiring Phares his filing of a charge with the Board. However, as noted above, Respondent was continuing to violate the Act by continuing to fail to recall Phares when a position for which he was qualified became available on May 30. There is no reason Phares could not have been recalled to the vacant oiler position for which a referral was requested on June 28, even if Respondent did not believe him qualified to run a magnet crane. Thus, Respondent again demonstrated its unwillingness to reemploy Phares for a position for which he was qualified without giving any reason for its unwillingness.

CONCLUSIONS OF LAW

l. The Respondent, Anderson Excavating and Wrecking Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent engaged in and continues to engage in conduct in violation of Section 8(a)(1) and (3) of the Act by refusing to recall its employee George Phares from layoff on May 30, 1990, and thereafter to perform work for which he is qualified.

4. The Respondent did not engage in the other unfair labor practices alleged in the consolidated complaint.

5. The unfair labor practices which Respondent has engaged in are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, it is recommended that it be ordered to cease and desist therefrom, and take certain affirmative action which is necessary to effectuate the policies of the Act.

As the Respondent has unlawfully refused to recall its employee George Phares from recall since May 30, 1990, and continuing to date, it is recommended that Respondent be ordered to offer Phares immediate reinstatement to his former position, or if that position no longer exists to a substantially similar position,[9] and make Phares whole for any loss of earnings or any other benefits he may have suffered as a result of Respondent's unlawful discrimination against him, to be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987).

[Recommended Order omitted from publication.]

[8] Again, Phares did not ask and the Union did not file a grievance over the refusal to rehire Phares. For that matter, Murphy did not even seem to argue with Respondent over the refusal which also makes me doubt the truthfulness of the Charging Party's evidence about the events of June 29.

[9] Reinstatement as of this date is unlikely as Respondent's project in Springfield, Illinois, is likely finished.

Deborah A. Fisher, Esq., for the General Counsel.
Gerald Tockman, Esq., of St. Louis, Missouri, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On May 17, 1991, I issued a decision finding that Anderson Excavating and Wrecking Company (Respondent), inter alia, violated Section 8(a)(3) of the National Labor Relations Act (Act) by refusing to recall Charging Party George Phares from layoff. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of my decision.

On November 25, 1991, the Board issued an order remanding this proceeding to me to make further credibility findings and to modify, if necessary, any findings of fact, conclusion of law, or recommended action.

I. DIRECTION AND ACTION ON REMAND

A. *The Board's Direction on Remand*

In its Order remanding, the Board recites:

Union Business Representative Charlie Murphy testified that on May 30, 1990, he received a phone call from Respondent Vice President Lanny Levell requesting an oiler. Murphy allegedly reminded Levell that George Phares was laid off from the Respondent's employ and that Levell should call Phares back for the oiler position. Levell allegedly responded that he would not hire Phares as an oiler because he was an operator.

In section III,C, paragraph 1, of my decision, I stated that although Levell did not deny the conversation because he did not testify after Murphy, questioning by the General Counsel revealed that Levell was in Washington, D.C., on May 30, 1990, and that ''it is difficult to believe that he, rather than Mr. Anderson [the Respondent's job superintendent], called the union hall to place a routine request for another oiler. In any event, the fact remains that on May 30, an oiler was requested and Mr. Phares was qualified to be an oiler.'' Further, in the penultimate paragraph of my decision, in the course of discrediting Murphy's testimony on another aspect of this case, I stated: ''He [Murphy] also alleges that a damaging conversation with Mr. Levell took place on May 30, a date Mr. Levell was in Washington, D.C.''

In its exceptions, the Respondent argues, inter alia, that I erred in failing to consider its argument that it had simply followed the collective-bargaining agreement in requesting that the Union make a referral for an oiler position and in hiring the employee whom the Union referred. The Union referred employee Fickus and not Phares. The Respondent points out that article III,A, paragraph 6, of the collective-bargaining agreement requires that the Respondent accept a referred member employee unless there is just cause to reject him or her. We are unable to pass on the Respondent's argument concerning the referral, however, because I failed to make crucial findings about the alleged May 30, 1990 phone conversation.

The Board has decided to remand this case to me for specific credibility resolutions as to the alleged May 30 conversation. Specifically, I am to determine whether the conversation took place and whether Murphy specifically stated that Respondent should call Phares back to work as an oiler.

B. *Directed Credibility Resolution*

Because Levell was in Washington, D.C., on May 30, 1990, and it was the practice of the Respondent to request employees from the union hall on a local basis, and because of my doubts about Murphy's credibility set out at pages 16–20 of my original decision, I find that the conversation in question did not take place.

C. *Further Discussion of the Issues in Light of the Order Remanding*

I agreed at the hearing and I agree now with the Respondent that if it requested an employee from the union hall it was obligated to take the employee referred so long as the employee was qualified for the job. I still contend that this fact and the defense based on this fact make no difference to the proper disposition of this case.

On May 30, 1990, the Union could not have referred Phares out to the job as an oiler because he was already referred out to the job. He was technically at least still in Respondent's employ and subject to recall to fill any job opening for which he was qualified, including that of oiler. Pursuant to the Union's rules governing referrals, Phares could not be referred to any other job until he reregistered at the union hall, an event which did not take place until late June. Therefore, on May 30, the Union was obligated to refer someone other than Phares to fill the requested oiler position if requested by the Employer to do so.

However, the Respondent could have recalled Phares from layoff to fill this position without asking for a further referral from the union hall or without even notifying the Union. As I found at pages 14–16 of my original decision, it was Respondent's consistent practice to do just that. Respondent regularly recalled employees from layoff to perform duties other than those originally assigned, and transferred employees from job to job to avoid their layoff in furtherance of its admitted goal of keeping its crew together. It was the variance from this past practice in Phares' case, and thus disparate treatment of Phares, that I found to be unlawful because of Respondent's unlawful motivation. There was no reason advanced by Respondent for not recalling Phares that was not contradicted by past practice. There was no legitimate business reason advanced for not recalling Phares rather than seeking the referral of a new employee. Certainly, the collective-bargaining agreement did not in any way bar the recall of Phares to fill the oiler position on May 30.

I found in my earlier decision, and I find again, that Respondent refused to recall Phares from layoff to fill the oiler position on May 30, 1990, because of its displeasure with Phares' protected activities and for no other reason.

II. CONCLUSIONS AND RECOMMENDED DISPOSITION OF THIS PROCEEDING

Pursuant to the direction of the Order Remanding, I have made the requested credibility resolution. With addition of this credibility resolution, I adopt by reference, without modification, the findings of fact, conclusions of law, remedy, and recommended Order set forth in my decision issued May 17, 1991.

[Recommended Order omitted from publication.]